First, the court's characterization of the gravamen of the plaintiffs' complaint hinging "on the determination of whether the plant is complying with the Joint Guidance" is highly questionable.[35] While the plaintiffs certainly alleged that Smithfield failed to comply with federal standards, their public nuisance claims were based on state common law.[36] Smithfield's alleged failure to follow issued guidelines served as only background evidence to support the plaintiffs' causes of actions.[37]

Second, even if the case did turn on whether or not the defendants were complying with federal regulations, it is still unclear why a district court cannot interpret "the meaning of agency regulations," considering that "interpretation of such materials is well within the conventional experience of judges."[38]

Contrast *Smithfield* with another example of a district court decision invoking the primary jurisdiction doctrine. In *Cox. v. Gruma Corp.*, a California court referred a case to the Food and Drug Administration (FDA) in order to decide whether labeling food products containing genetically modified organisms as "all natural" violated consumer protection law.[39] There, the FDA had not addressed the primary issue "even informally."[40] Recognizing that it lacked the specified knowledge to decide the novel issue, the court deferred to the agency. Here, OSHA and CDC published their expert recommendation for COVID-19 protocols.[41] Why can't a court use its judicial expertise to apply those existing regulations to issues of fact?[42]

35. *Id.* at 15.

36. Complaint, *supra* note 17, at 3.

37. Plaintiffs' Emergency Motion for A Preliminary Injunction, Rural Cmty. Workers All. v. Smithfield Foods, Inc., No. 5:20-cv-06063-DGK (April 23, 2020) at 14 ("Smithfield's failure to follow basic public health guidelines during the COVID-19 pandemic is a paradigmatic public nuisance, which endangers Plaintiffs and threatens the public health.").

38. Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 938, 939 (8th Cir. 2005) (citing Access Telecomms. v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998)).

39. No. 12-CV-6502 YGR, 2013 WL 3828800, at *1-2 (N.D. Cal. July 11, 2013).

40. *Id.* at *2.

41. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 34.

42. *See, e.g.*, St. Clair v. Kroger Co., 581 F. Supp. 2d 896, 900 (N.D. Ohio 2008) ("Determining whether Kroger marketed and labeled its beef in a false and misleading way does not require specialized knowledge of the meat industry or the body of regulations of the USDA. My role—and the role of the jury—is to determine *whether Kroger complied with already clear* regulations.") (italics added); *cf.* Jones v. ConAgra Foods, Inc., 912 F. Supp. 2d 889, 898-99 (N.D. Cal. 2012) ("[A]llegations of deceptive labeling do not require the expertise of the FDA to be resolved in the courts, as every day courts decide whether conduct is misleading." (citations and quotation marks omitted)).

Another illustrative case arose, ironically, in the District Court for the Eastern District of Missouri just days after *Smithfield* was decided. In *St. Louis County v. House of Pain Gym Services*,[43] St. Louis County sought a temporary restraining order to enforce its COVID-19 business operating restrictions on a local gym that refused to close in April 2020.[44] The gym asked the court to invoke the primary jurisdiction doctrine.[45] After citing *Smithfield*, the court refused, explaining: "this Court, as with other courts, is certainly capable of rendering a decision regarding whether Defendants are engaged in a public nuisance—either under common law or the County nuisance ordinance."[46] The Eastern Missouri court did not say it disagreed with *Smithfield*'s holding and, admittedly, the two cases are factually distinguishable.[47] For one, the fact that the gym was violating the ordinance was a much easier question than the complex issues presented in *Smithfield*. Nonetheless, *House of Pain Gym Services* demonstrates a court willing to decide a public nuisance case (like *Smithfield*) based on violation of an ordinance, without referring the case elsewhere.

B. Uniformity

Judge Kays also found invoking the primary jurisdiction doctrine necessary in order to ensure uniformity across cases. This argument is fairly weak. Unlike *Cox* for example, where the question was categorical—i.e., is it mislabeling to write "all natural" on foods containing genetically modified ingredients—*Smithfield* is a case-specific inquiry.[48] The court's determination regarding the Smithfield plant is not likely to conflict with other courts' rulings because the facts of each case will inevitably differ.[49] However, if courts were to decide whether genetically modified ingredients can be labeled "all natural," there would be contradicting decisions on that singular issue.

43. No. 4:20cv655 RLW, 2020 WL 2615746 (E.D. Mo. May 22, 2020).

44. *Id.* at *1.

45. *Id.* at *3.

46. *Id.*

47. *See generally id.*

48. *See* Cox v. Gruma Corp., No. 12-CV-6502 YGR, 2013 WL 3828800, at *2 (N.D. Cal. July 11, 2013).

49. *See* Haynes v. Kohl's Dept. Stores, 391 F. Supp. 3d 1128, 1139 (S.D. Fla. 2018) (blind plaintiffs sued alleging Kohl's website did not comply with requirements under the Americans with Disabilities Act; the court found that "it is not apparent why any need for uniformity should serve as a basis for dismissing or staying this matter. Defendant has failed to show that the need for uniformity here outweighs this Court's ability to fashion a remedy, if needed, that would apply only in this particular case").

Interestingly, the only other instances in which Judge Kays has applied the primary jurisdiction doctrine were a pair of cases in 2017 and 2018 involving the Federal Communications Commission's complex regulations governing compensation paid between telecommunication networks for trafficking calls on each other's network.[50] There too, the "uniformity" rationale is questionable because the inquiries were so fact intensive and case-specific. In fact, in the 2018 case, one party argued that referral to the FCC was unnecessary because of the FCC's determination in the prior 2017 case (after the Judge Kays sent the question to the FCC).[51] But Judge Kays rejected the notion, calling it "mere speculation" that one case would resolve the other.[52] Paradoxically, Judge Kays recognized the nuanced nature of the cases when asking for agency guidance, but did not acknowledge that for the same reason the "uniformity" rationale fails to justify the assertion of primary jurisdiction.[53] When a decision in one case is unlikely to truly contradict decisions in other cases, there should be little concern for lack of uniformity. This applies even when the facts of the cases are *superficially* comparable.

C. Added Delay

Until this point, I have explained instances in which it would be prudent to invoke primary jurisdiction, and why *Smithfield* was not such a case. The doctrine of primary jurisdiction also has an inherent downside that should never be glossed over. As courts have cautioned, the doctrine "is to be invoked sparingly, as it often results in added expense and delay."[54] That is, judges should be wary of deferring matters originally cognizable by a district court to an agency because of the added litigation costs and delay. Indeed, many courts have declined to invoke the primary jurisdiction doctrine for that reason.[55] How much

50. AT&T Corp. v. Mo. Network All., LLC, No. 4:18-CV-00119-DGK, 2018 U.S. Dist. LEXIS 122357 (W.D. Mo. July 23, 2018); Sprint Commc'ns Co. v. Mo. Network All., LLC No. 4:17-CV-00597-DGK (W.D. Mo. Oct. 18, 2017).

51. *AT&T Corp.*, 2018 U.S. Dist. LEXIS 122357 at *3-4.

52. *Id.* at *4.

53. *See id.*

54. Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 938, 938 (8th Cir. 2005) . The Ninth Circuit has repeatedly called "efficiency" the "deciding factor" in deciding whether to use the primary jurisdiction doctrine. *See, e.g.*, Rhoades v. Avon Prod., Inc., 504 F.3d 1151, 1165 (9th Cir. 2007).

55. *See, e.g.*, City of W. Sacramento v. R & L Bus. Mgmt., No. 218CV00900WBSEFB, 2020 WL 4042942 (E.D. Cal. July 17, 2020) (toxic waste pollution case where court declined to invoke the primary jurisdiction doctrine in part because of delay); *In re* JUUL Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.,

more relevant could that rationale be when human life is literally on the line? It is hard to imagine a more time-sensitive issue than the one the Smithfield employees presented. It would be one thing if the *Smithfield* court reached the merits and determined that issuing an injunction was improper.[56] To avoid deciding the case altogether is quite another—and it came at a profound cost.

At the time the *Smithfield* plaintiffs filed their complaint, another pork processing plant operated by the same defendants in South Dakota had already become a major COVID-19 hotspot.[57] Hundreds of employees tested positive for COVID-19, and some had already died from the virus.[58] Smithfield eventually closed the plant, as well as plants in Wisconsin and in another part of Missouri.[59] Although the full extent of these outbreaks came to light only in the ensuing months, at the time the complaint was filed, the media had already reported major outbreaks in other Smithfield-owned plants.[60]

Judge Kays addressed the concern for delay in a single paragraph, but his attempts to assuage such fears are unavailing. He wrote that OSHA's emergency statutory framework provides plaintiffs with sufficient remedy because it allows the Secretary of Labor, and in some instances individuals, to petition the court "to restrain any [dangerous] conditions or practices in any place of employment."[61] However, that remedy provides little comfort because the emergency option is rarely invoked. Additionally, even if it was invoked here, the case would wind up right back where it began: in a federal courthouse—a rather

No. 19-MD-02913-WHO, 2020 WL 6271173, at *8 (N.D. Cal. Oct. 23, 2020) (suits against vaping companies where court declined to exercise primary jurisdiction saying, "a delay of *at least* twelve months is at stake" and "[t]here is no reason to impose such a lengthy delay." (italics in original)).

56. In fairness to Judge Kays, he did go on to write an alternative holding in order "to aid in any appellate review" (his words), in which he did explain that issuing an injunction would be improper even absent the assertion of primary jurisdiction. Still, he also wrote that the primary jurisdiction doctrine was "dispositive," skirting the merits of the case. *See* Order Granting Defendant's Motion to Dismiss, *supra* note 17, at 17.

57. *See generally* Complaint, *supra* note 17.

58. *See id.* at 2.

59. See Wang, *supra* note 16 ("On April 12, the company shuttered the facility indefinitely; as reports of coronavirus cases at the plant continued to rise, the company also announced the closure of two facilities in Wisconsin and Missouri on April 15.").

60. *See, e.g.*, Noam Scheiber & Michael Corkery, *Missouri Pork Plant Workers Say They Can't Cover Mouths to Cough*, N.Y. TIMES, April 24, 2020, at B3; Jessica Lussenhop, *Coronavirus at Smithfield Pork Plant: The Untold Story of America's Biggest Outbreak*, BBC NEWS (April 17, 2020), https://www.bbc.com/news/world-us-canada-52311877 [https://perma.cc/Z4QC-TDJV].

61. Order Granting Defendant's Motion to Dismiss, *supra* note 17, at 16 (citing Occupational Safety and Health Act, 29 U.S.C. § 651 *et. seq.*).

circuitous path.[62] Judge Kays continued: "Granted, there may be some delay before Plaintiffs can invoke this procedure, but following this procedure ensures the USDA and OSHA can take a measured and uniform approach to the meat-processing plants under its oversight."[63] When human life is literally in grave danger, "measured and uniform" approaches should give way to action and intervention.[64] Whether or not one agrees with the relatively novel theory of public nuisance in the context of infected factory workers, a court should at least reach the merits in such exigent circumstances.[65] At the time Judge Kays opted not to decide the case, it was known that COVID-19 is dangerous and highly contagious, especially when many people gather indoors in close proximity to one another.[66] If the allegations in the plaintiffs' complaint were true, the employees, their families, and the public at large were all at risk of contracting this very serious virus. They deserved a prompt response and resolution from the court.[67]

62. *See* Does I, II, III v. Scalia, 530 F. Supp. 3d 506, 518-19 (M.D. Pa. 2021) (noting that "*no court has ever* confronted a complaint in mandamus under Section 13(d)" and holding that such relief can only be afforded "where the Secretary [of Labor] has been presented with a finding of imminent danger *by an OSHA inspector* and has arbitrarily and capriciously rejected the recommendation to take legal action.") (emphasis added). Of note, the *Does I, II, III* court also discussed the portion of Judge Kays' opinion which touted this alternate avenue for relief, but characterized it as still acknowledging "that there are certain prerequisites to being able to obtain such relief." *Id.* at 519-20.

63. Order Granting Defendant's Motion to Dismiss, *supra* note 17 at 17.

64. *Id.*

65. *See, e.g.*, Palmer v. Amazon.com, Inc., 20-cv-2468 (BMC), 2020 WL 6388599, at *7-8 (E.D.N.Y. Nov. 2, 2020).

66. *See* Ben Westcott & Adam Renton, *May 4 Coronavirus News*, CNN (May 4, 2020, 9:19 PM), https://www.cnn.com/world/live-news/coronavirus-pandemic-05-04-20-intl/index.html [https://perma.cc/B93X-WK8X].

67. While in a very different legal context, another recent case in federal district court illustrates how ill-suited the primary jurisdiction doctrine is at handling urgent matters of health and safety. There, five individuals who were civilly-committed to psychiatric hospitals sued Connecticut's governor (and others) over allegedly unsafe conditions during the COVID-19 pandemic. Plaintiffs sued under the theory that the facilities' failure to adequately protect them from exposure to COVID-19 violated their Constitutional rights under the Fourteenth Amendment (and for violations of federal anti-discrimination statutes protecting the rights of individuals with mental impairments.) The Court refused defendants request that it invoke the primary jurisdiction doctrine primarily because "the defendants have not identified a single case invoking the doctrine of primary jurisdiction in connection with claims alleging violations of individual rights under the Due Process Clause of the Fourteenth Amendment, let alone under any other constitutional provision." Wilkes v. Lamont, No. 3:20-cv-594 (JCH), 2020 WL 7481804, at *4, (D. Conn. Dec. 18, 2020).

The court's attitude toward the risks in delaying the case are especially troubling in light of the fact that the primary jurisdiction doctrine is a "prudential" doctrine and not "jurisdictional." In other words, sometimes courts have no right to hear a case, while at other times courts can choose to abstain for practical reasons. As pertinent here, some federal statutes contain provisions requiring exhaustion of administrative remedies before plaintiffs may seek relief in federal court.[68] For example, the Federal Tort Claims Act, which allows plaintiffs to sue the federal government in tort despite the general rule of sovereign immunity,[69] requires as a prerequisite that "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied."[70]

In *Smithfield,* the plaintiffs brought suit under common law doctrines of public nuisance and breach of duty.[71] They did not seek relief pursuant to any federal statute, much less one that contains an exhaustion requirement.[72] As one court put it: "[t]he doctrines of primary jurisdiction and exhaustion of remedies . . . are related but *significantly* different. The doctrine of primary jurisdiction is not, in our view, jurisdictional but prudential."[73] This means that Judge Kays was not required to apply the primary jurisdiction doctrine, making his decision to delay questionable.

It is also worth reflecting on OSHA's handling of the pandemic at the time of the court's order. Even as of mid-September 2020, the sum of monetary fines issued against Smithfield for unsafe conditions in its plants totaled less than $30,000. This caused outrage amongst factory workers and workplace-safety advocates.[74] More generally, the former Secretary of Labor, to whom OSHA's administration must answer, has been widely criticized for inaction during the pandemic.[75] Some federal

68. *See* Peter A. Devlin, Note, *Jurisdiction, Exhaustion of Remedies, and Constitutional Claims,* 93 N.Y.U. L. REV. 1234, 1242 (2018) ("Congress can also codify an exhaustion requirement.").

69. *See* 28 U.S.C. § 2674 (1988).

70. 28 U.S.C. § 2675(a) (1988).

71. *See* Complaint, *supra* note 17, at 18-22.

72. *See generally id.*

73. Austin Lakes Joint Venture v. Avon Util., Inc., 648 N.E.2d 641, 645 (Ind. 1995) (italics in original).

74. *See* Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died of Covid-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST (Sept. 13, 2020), https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html [https://perma.cc/W33W-6J7L].

75. *See*, *e.g.*, David Michaels & Gregory R. Wagner, *Halting Workplace COVID-19 Transmission: An Urgent Proposal to Protect American Workers*, CENTURY

appeals courts (admittedly, not the Eighth Circuit) have explicitly instructed courts to consider whether the agency has addressed the litigated matter before invoking the primary jurisdiction doctrine. Clearly, Judge Kays did no such thing.[76]

From another portion of his order, it also seems that Judge Kays may not have appreciated what was at stake. In an alternative holding, he addressed the merits of the complaint and found that Plaintiffs failed to show a "threat of irreparable harm," which is "the extraordinary burden" necessary for a court to issue an affirmative preliminary injunction."[77] Judge Kays wrote that contracting COVID-19 is a harm "too speculative under Eighth Circuit precedent."[78] The court then distinguished two Eighth Circuit cases cited by the plaintiffs in their brief: "in other words, the threat of serious injury or death [in the two cases] was a certainty and not merely a possibility."[79] The court reasoned that in those cases, which involved respectively, revocation of medical care for the needy and insurance coverage denial, "the plaintiffs were already suffering from illnesses, and would undoubtedly suffer serious illness or death in the absence of an injunction."[80] Even granting the factual distinction, "potentially contracting COVID-19, which could result in serious illness

F. (Oct. 15, 2020), https://tcf.org/content/report/halting-workplace-covid-19-transmission-urgent-proposal-protect-american-workers/?agreed=1&agreed=1 [https://perma.cc/6SJ3-JF55] ("[T]he Occupational Safety and Health Act also contains a provision authorizing OSHA to issue an Emergency Temporary Standard (ETS) for new hazards that pose a 'grave danger' to workers. Secretary of Labor Eugene Scalia and the Trump administration have made the decision that . . . [OSHA would not] issue Emergency Temporary Standards . . . and, as witnessed in all too many worksites—from warehouses to meatpacking to fast food restaurants—enforceable rules are necessary . . . .").

76. For example, in the Tenth Circuit one of five factors courts must consider is "whether the agency has demonstrated diligence in resolving the issue or has instead allowed the issue to languish." Friends of Santa Fe Cty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1350 (D.N.M. 1995). In another recent case that used the primary jurisdiction doctrine, the court noted that "relevant agency proceedings ha[d] actually been initiated . . . [and the agencies] acted with deliberate care and diligence . . . to resolve[] the issue" as reason to defer to the agency and dismiss the case. Southwest Org. Project v. United States Air Force, No. CIV 20-0098 JB/JFR, 2021 WL 965478, at *41 (D.N.M., Mar. 15, 2021) (citation and quotation marks omitted) (toxic waste pollution case).

77. Order Granting Defendant's Motion to Dismiss, *supra* note 17 at 17, 20.

78. *Id.* at 18.

79. *Id.* at 19.

80. *Id.*

or even death,"[81] (in the court's own words), should also suffice to meet the "*threat* of irreparable harm"[82] standard.

At least one court agreed that the *Smithfield* court determined the degree of harm in question incorrectly. In *Massey v. McDonald's Corp.*, an Illinois state court criticized *Smithfield*, saying that "it is difficult to imagine a harm more irreparable than serious illness or death caused by this highly contagious disease" and therefore "the possibility of being infected by COVID-19 is an irreparable harm."[83] Noting that "courts around the country" have taken the dangers of COVID-19 seriously when deciding whether to grant injunctive relief, the *Massey* court "disagree[d] with the conclusion in Smithfield and [found] that COVID-19 does present an immediate harm."[84]

Much like his cursory treatment of the "added delay" factor in applying the primary jurisdiction doctrine, Judge Kays again seems to underappreciate the urgency the COVID-19 pandemic presented, determining that there was no "threat of irreparable harm."[85]

D. The Future: A New Trend?

This paper focuses on a single case, but one that underscores the potential hazard of the primary jurisdiction doctrine, which will remain relevant well past the COVID-19 pandemic. The doctrine will almost always delay the resolution of a case. When allegations presented to a court involve serious matters of safety and human health, courts ought to be wary in *choosing* to apply this prudential doctrine. This is especially true in cases where the twin rationales of agency expertise and uniformity are underwhelming.

Additionally, this case may be representative of an alarming trend in which judges seem to be more keen to utilize primary jurisdiction. Plaintiffs in a more recent suit, with facts similar to *Smithfield*'s, received identical treatment from a court in the Eastern District of New York.[86] Employees who work at JFK8, an Amazon fulfillment center that employs thousands of workers and "is larger than fourteen football

81. *Id.* at 18.

82. Dataphase Sys. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (emphasis added).

83. No. 20 CH 4247, 2020 Ill. Cir. LEXIS 465, at *50 (Ill. Cir. Ct. June 24, 2020).

84. *Id.* at *50-51 (citations omitted).

85. *Dataphase*, 640 F.2d at 114.

86. *See* Palmer v. Amazon.com, Inc., 20-cv-2468 (BMC), 2020 WL 6388599, at *8 (E.D.N.Y. Nov. 2, 2020).

fields," sued the company for allegedly unsafe working conditions during the pandemic.[87] Judge Brian M. Cogan wrote in his decision:

> Plaintiffs argue that their workplace safety claims simply 'require the application of law to disputed facts' and do not implicate OSHA's expertise and discretion. I disagree. The central issue in this case is whether Amazon's workplace policies at JFK8 adequately protect the safety of its workers during the COVID-19 pandemic . . . [C]ourts are not expert in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance. Plaintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion . . . Court-imposed workplace policies could subject the industry to vastly different, costly regulatory schemes in a time of economic crisis. A determination by OSHA, on the other hand, would be more flexible and could ensure uniformity.[88]

This opinion suffers from much of the same flaws as Judge Kays', as it overplays both the need for agency expertise to decide the matter and the likelihood of divergent court decisions.[89] And this court's treatment of the "added delay" factor is even harsher than the court in *Smithfield*'s. Judge Cogan acknowledged his "decision w[ould] necessarily delay the implementation of plaintiffs' proposed relief" but argued that "at least part of the responsibility for that delay lies with plaintiffs" because they "decided not to pursue emergency relief in this case and did not pursue a parallel track by applying to OSHA."[90]

Plaintiffs, represented by numerous advocacy groups, have appealed the decision at the Second Circuit.[91]

CONCLUSION

The primary jurisdiction doctrine is generally a useful tool for enhancing the relationship between federal courts and agencies. However, it should not be used in incredibly urgent circumstances. In

87. *Id.* at *1. Some of the named plaintiffs included household family members of the employees who alleged they were harmed by exposure to the virus through their family members (like in *Smithfield*.)

88. *Id.* at *6.

89. See Opening Brief for Plaintiff-Appellants, Palmer v. Amazon.com, 20-3989-cv, at 19-30 (appeal to Sec. Cir., Jan. 11, 2021).

90. *See Palmer*, 2020 WL 6388599, at *7.

91. Opening Brief for Plaintiff-Appellants, *supra* note 89. Plaintiffs argue "the district court's conclusion is inconsistent with [the Second Circuit's] and the Supreme Court's primary jurisdiction precedents, the text of the OSH Act, and principles of federalism. It should be reversed." *Id.* at p. 29-30.

deciding cases where delay puts people's health at risk, and where the benefits of deferring to an agency are minimal, courts should not shirk their judicial obligation. *Smithfield* and *Palmer* are good examples of when courts should not apply the primary jurisdiction doctrine.